PD-0268-21
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 11/3/2021 2:25 PM
Accepted 11/4/2021 8:29 AM
DEANA WILLIAMSON
CLERK

PD-0268-21

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
11/5/2021
DEANA WILLIAMSON, CLERK

DARYL JOE V. STATE OF TEXAS

ON DISCRETIONARY REVIEW FROM THE 10TH COURT OF APPEALS

NO. 10-18-00221-CR

FROM THE 13TH JUDICIAL DISTRICT COURT

NAVARRO COUNTY, TEXAS

D37,693-CR

APPELLANT'S BRIEF ON THE MERITS

Damara H. Watkins
Attorney for Appellant
110 W. Collin
Corsicana, Texas 75110
(903)641-2595
State Bar No. 00787740
damarawatkins@gmail.com

IDENTITY OF PARTIES AND COUNSEL

Trial Judge: Hon. James Lagomarsino
Navarro County Court at Law
300 W. 3rd Avenue
Corsicana, Texas 75151

Appellant: Daryl Joe #2208036
Coffield Unit
2661 FM 2054
Tennessee Colony, TX 75884

Appellant's Trial and Appellate Counsel: Damara H. Watkins
Attorney at Law
110 W. Collin
Corsicana, Texas 75110

Appellee: The State of Texas

Appellee's Counsel: Will Thompson
Criminal District Attorney
Navarro County
300 W. 3rd Avenue
Corsicana, Texas 75110

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATEMENT REGARDING ORAL ARGUMENT

Oral Argument was not requested by Appellant and the Petition for Discretionary Review was granted without Oral Argument.

STATEMENT OF THE CASE

Appellant was charged in two separate indictments with the offenses of Possession of a Controlled Substance and Theft of Cargo in the 13th Judicial District Court of Navarro County. The cases were consolidated in Cause Number D37,693-CR and a single jury trial was held. Appellant was found not guilty of Possession of a Controlled Substance. The jury found Appellant guilty of the offense of Theft of Cargo. Appellant pled true to two enhancement paragraphs and, after a brief hearing, punishment was assessed by the Court at 37 years confinement in TDCJ.

Judgment was pronounced on June 18, 2018. Appellant appealed to the 10th Court of Appeals. The judgement was affirmed by the 10th Court of Appeals in an opinion dated March 3, 2021 with Justice Tom Gray dissenting. Appellant filed a Pro-Se Petition for Discretionary Review which was granted by this Court. This Court ordered the Trial Court to determine indigency and appoint counsel. Indigency was determined and Counsel was appointed on September 15, 2021 by the Trial Court. Counsel requested an extension of time to file this required brief to allow Counsel the full 30 days afforded by the Rules of Appellate Procedure.

ISSUE PRESENTED

Whether the 10th Court of Appeals erred in holding the evidence legally sufficient to support Appellant's conviction for the offense of Theft of Cargo?

STATEMENT OF FACTS

On the evening of January 25, 2017, Appellant entered the premises of Corsicana Bedding in Corsicana, Navarro County, Texas. Appellant was driving a 2013 Volvo semi-truck, blue in color. Appellant entered the yard by driving through the front gated entry. (State's Exhibit 2). He then proceeded to back the truck up to a trailer containing mattresses manufactured there at the Corsicana Bedding facility. The

mattresses had previously been loaded onto the trailer at a loading dock on the premises and the trailer was parked in the yard awaiting transport as per regular procedure. (3 Reporter's Record [RR] 99-103). An employee of Corsicana Bedding, Juan Carlo Perez, approached Appellant and began to take pictures of truck and trailer. (3 RR 145, 147, 148). According to Perez, Appellant had "connected" his truck to the trailer by backing under it. (3 RR 148). Perez explained this connection occurs automatically when the truck is backed into position under the trailer. (3 RR 152). Perez further explained that in order to complete the process of hooking the truck to the trailer, the brake lines would have to be manually connected and the levelers or "jacks" would have to be manually raised. (3 RR 151-153). Appellant had connected the brake lines nor raised the levelers before Perez approached. (3 RR 149, 154). Perez believed something was wrong and contacted his superior, Raphael Lemus. (3 RR 149). Mr. Lemus arrived on the scene and talked to Appellant. (3 RR 164). Lemus testified that Perez sent him a picture of the truck and trailer and that in the picture, the truck was backed under the trailer and "connected" but the brake lines were not connected and the jacks were not raised.(3 RR 174-177). Lemus stated that when he arrived, the truck and trailer were no longer connected. (3 RR 165, 166, 172). Both Perez and Lemus acknowledged that

without the brake lines being connected, the trailer brake was still engaged and the trailer containing the mattresses could not be moved. Further, they both acknowledged that the trailer could not be moved without the levelers being raised. (3 RR 153, 179-180).

Appellant attempted to explain that he was there to pick up a load and gave Lemus a number matching the trailer number. (3 RR 166-167). Upon being questioned by Lemus, Appellant called his dispatcher and allowed Lemus to speak to the dispatcher on his cell phone. (3 RR 168-169). Lemus was unable to communicate with the dispatcher due to a bad connection. (3 RR 169). Appellant left the yard and went up the street to the Valero station to get some food. (3 RR 171, State's Exhibit 15). Lemus, who does not speak English very well and testified with a translator, had his wife to call the police. (3 RR 166). The police arrived at the Valero station and made contact with Appellant. Appellant told the police he was at Corsicana Bedding to pick up a load and that there was a problem so he left. He told the police that he had worked for this trucking company for 4 days for a man named Cliff, who had sent him down to Corsicana to pick up the load. (State's Exhibit 15)/ According to a temporary tag located in the truck, the truck was registered to a Clifford Lewis. (4 RR 106 - 107). Although the police

did not attempt to investigate Mr. Lewis, the trucking company, or the truck itself, investigators with the District Attorney's office located Mr. Lewis prior to trial. At trial, Mr. Lewis claimed the 5th Amendment and avoided testimony, but his recorded statement was admitted into evidence and played for the jury. In the recorded statement, Lewis denied any ownership of the truck or knowledge of the incident at Corsicana Bedding. (State's Exhibit 29). Appellant's recorded statement was also admitted in which Appellant denied any attempted theft and stated that he believed he was there to pick up a legitimate load after being dispatched to the location by Mr. Lewis. (State's Exhibit 15).

SUMMARY OF THE ARGUMENT

The evidence is insufficient to support Appellant's conviction for Theft of Cargo because the mattresses were not stolen cargo as defined by the relevant statute, Texas Penal Code 31.18, because they were not yet "moving in commerce" because they had not left their "point of origin." Should the Court of Criminal Appeals find that the evidence was insufficient based on this argument, the Court of Appeals decision should be reversed, and an acquittal entered.

Notwithstanding the previously stated argument, the evidence is also insufficient to support Appellant's conviction for Theft of Cargo because Appellant did not

conduct an activity in which he possessed the trailer and its contents. As recognized by Justice Gray in his dissent in the 10th Court of Appeals, a reasonable trier of fact could not have found from the evidence that Appellant ever "possessed" the goods in question. Justice Gray reasoned that Appellant had attempted to "possess" the trailer and goods, but because he did not complete the "hooking up" process, he was never in possession of the trailer or goods. Should the Court of Criminal Appeals find the evidence insufficient based on this argument, the Court of Appeals decision should be reversed and the judgment reformed to reflect a conviction for the lesser included offense of Attempted Theft of Cargo and the case remanded to the Trial Court for a new punishment hearing.

ARGUMENT

The evidence is insufficient to support Appellant's conviction for Theft of Cargo. The legal sufficiency analysis in this case turns on whether enough evidence existed for any rational fact-finder to find beyond a reasonable doubt that a) the trailer and its contents were cargo within the meaning of the relevant statute and, if the trailer and its goods were, if fact, cargo, and b) that Appellant conducted an activity in which he possessed the cargo.

Evidence is legally sufficient only if the state has affirmatively proven each

of the essential elements of the offense. *Gold v. State*, 736 S.W.2d 685 (Tex. Crim. App. 1987), overruled on other grounds in *Torres v. State*, 785 S.W.2d 824 (Tex. Crim. App. 1989); *Jackson v. Virginia*, 443 U.S. at 319; *Adames v. State*, 353 S.W.3d 854, 859-860 (Tex. Crim. App. 2011). The state has the burden of proving each and every element of the offense charged beyond a reasonable doubt. The facts as they relate to these elements are basically undisputed. The dispute here centers on whether the facts, as a matter of law, are adequate to establish the offense of cargo theft. To resolve this question, this Court must construe the cargo theft statute to determine whether it properly reaches this type of conduct. See *Delay v. State*, 465 S.W.3d 232, 235 (Tex. Crim. App. 2014) (recognizing that sufficiency review sometimes "involves simply construing the reach of the applicable penal provision in order to decide whether the evidence, even when viewed in the light most favorable to conviction, actually establishes a violation of the law"); *See also Lang v. State*, 561 S.W.3d 174 (Tex.Crim.App. November 18, 2018). Appellant argues that there is insufficient evidence regarding these two elements of the relevant statute based on the proper construction of the statute and the terms therein.

Appellant was charged with Cargo Theft under Texas Penal Code §31.18(b)(1). That section provides that a person commits an offense if the person knowingly or

intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, abandons, or disposes of stolen cargo. More specifically, as charged in the indictment, the state alleged that Appellant conducted an activity, specifically hooking up to the trailer in question, in which he possessed the alleged cargo. (3 RR 31).

Cargo is defined for the purposes of §31.18(b) as "goods, as defined by Section 7.102, Business & Commerce Code, that constitute, wholly or partly, a commercial shipment of freight moving in commerce. A shipment is considered to be moving in commerce if the shipment is located at any point between the point of origin and the final point of destination regardless of any temporary stop that is made for the purpose of transshipment or otherwise." Texas Penal Code §31.18(a)(1).

Insufficient evidence that the goods in question were "stolen cargo."

First, Appellant argues that the evidence was legally insufficient to prove that the trailer and its contents were, if fact, cargo, as defined by the statute. The uncontroverted evidence was that the mattresses were manufactured at the Corsicana Bedding facility where they remained during the incident in question. The mattresses were loaded onto the trailer at the facility and there awaited their movement into commerce. However, at the time of this incident, they remained at

their point of origin and had not yet begun their movement into commerce. The mattresses were not yet at a point "between" their point of origin and their final destination as they were still, and at all relevant times remained, at their point of origin. Both the majority and the dissent in the Court of Appeals stretch the plain meaning of "point of origin" to reach results not intended by the Legislature. The term "point of origin" does not have a codified definition in Texas Law. Web searches for definitions all reference a physical location rather than ownership as relied upon by the majority in the Court of Appeals. The plain meaning of the term can be stated in several ways, all referring to a physical location. The website globalnegotiator.com defines point of origin as the location at which a shipment is received by a transportation line from the shipper. According to uslegal.com, in shipping, a point of origin is the location or station were a carrier receives a shipment for delivery to its destination. For other purposes, the point of origin of imported goods may refer to where the goods were manufactured or produced. Counsel recognizes these definitions are not mandatory or even persuasive authority, but they do shed light on the plain meaning associated with the term. To differentiate between the loading dock and the shipping yard of the manufacturer's facility as the dissent attempts is stretching the plain meaning beyond a normally recognized

meaning in the industry. Further, stretching the meaning distorts the purpose of the legislation.

In analyzing a statute, a court should "seek to effectuate the 'collective' intent or purpose of the legislators who enacted the legislation." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex.Crim. App. 1991); see *Cary v. State*, 507 S.W.3d 750, 756 (Tex. Crim. App. 2016); *Johnson v. State*, 423 S.W.3d 385, 394 (Tex. Crim. App. 2014). To do so, the court first looks to the literal text of the statute because "the text of the statute is the law in the sense that it is the only thing actually adopted by the legislators, probably through compromise, and submitted to the Governor." *Whitfield v. State*, 430 S.W.3d 405, 408 (Tex. Crim. App. 2014) (quoting *Boykin*, 818 S.W.2d at 785). To determine the plain meaning of the statutory language, courts will consult dictionary definitions, apply the normal rules of grammar and common usage, and consider words and phrases in context. *Cary*, 507 S.W.3d at 756; *Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016); *Yazdchi v. State*, 428 S.W.3d 831, 837 (Tex. Crim. App. 2014); see Tex. Gov't Code § 311.011(a). Every word in a statute has been used for a purpose and that each word, clause, and sentence should be given effect if reasonably possible. *Cary*, 507 S.W.3d at 756; *Perry*, 483 S.W.3d at 902–03; *Yazdchi*, 428 S.W.3d at 837.

Webster's defines the word "between" as "in the time, space, or interval that separates." *See* https://www.merriam-webster.com/dictionary/between. Other usages are presented but Appellant suggests this one is the best for this context. Common interpretation does not include the outer points as within the meaning of the term between. Further, a more inclusive interpretation including the outer points within the term between in this context would lead to absurd results. Consider that under such an interpretation, all consumer goods would remain "moving in commerce" after reaching their final destination whether that be Walmart or the consumer's home. Clearly it was not the intent of the legislature to raise the punishment levels of generalized theft of any and all consumer goods by including consumer goods at their final destination forever within the definition of cargo. The same reasoning applies to the goods taken at their "point of origin" as it does to the "final destination." Theft of goods from a factory is still general theft as differentiated from theft of cargo. The legislative intent of this statute, passed in 2015, was twofold. *See* Senate Research Center Bill Analysis for S.B. 1828, 84th Leg., R.S. One, the legislature was attempting to alleviate the problem of determining and proving when the driver's conduct vitiates the owner's initial consent in the taking of the goods in normal exchanges at the point of origin where

consent is typically present. The proponent of the bill advanced that this issue might be solved with the ability to charge a driver simply when the seal was broken on the cargo, or when the goods failed to be delivered, taking out the element of appropriation without consent. This problem in prosecution of the driver was alleviated in 31.18(b)(2) which refers specifically to the driver. But Appellant was not charged under 31.18(b)(2). Appellant was charged under the section which was designed to get the other actors – the bigger fish. In discussing that cargo theft was typically conducted by sophisticated organized crime rings, the author of the bill, which passed and was signed into law without amendment, opined that the bill would enable prosecution of the bigger fish that were not typically present in the initial encounter of the taking of the goods from the point of origin. *Id.* Appellant has been prosecuted and convicted under the portion of the statute designed to hold the rest of the syndicate liable. That is why the State is having to bend common meanings to make this offense fit. Neither of the stated purposes of the statute is furthered by an interpretation of the word "between" as including the two ends of the equation. In fact, in the instant case, the statute was used contrary to the stated intent of the legislation to enable the prosecution of and thus deter the big fish, but indeed to

heighten the punishment for the very "pawn" whose fate was lamented by the statute's sponsor. *Id.*

Appellant contends that the evidence is insufficient to show that the goods in question were, in fact, cargo as defined by the statute, because they remained at all times at their point of origin and they were never actually moving in commerce in that they were never at a point "between" the point of origin and their final destination.

Insufficient evidence that the goods, whether or not they were cargo, were "stolen" when, if ever, Appellant possessed them.

Additionally, Appellant argues that even if the goods are determined to be cargo within the meaning of the statute, the only "activity" Appellant is alleged to have conducted, "hooking up to the trailer" was conducted, if it was conducted, prior to the alleged cargo having become "stolen" as required by the statute.

The Court of Criminal Appeals has recently addressed this issue in connection with similar language in the organized retail theft statute in Texas Penal Code 31.16. *See Lang v. State*, 561 S.W.3d 174 (Tex.Crim.App. November 18, 2018). In that case, the Court observed that the statutory language refers to an "activity" involving "stolen retail merchandise." The court further reasoned that by its use of the past

participle of steal (e.g., "stolen"), the statute indicates that whatever "activity" is covered takes place with respect to retail merchandise that has already been stolen. In this case, there is no allegation or evidence that Appellant conducted any activity after the alleged "cargo" became "stolen" if it ever became "stolen", which would require an exercise of control over the property which Appellant argues never occurred in the first place. Neither the majority or the dissent in the opinion rendered by the 10th Court of Appeals addressed this specific contention although it was raised in the Court of Appeals.

Based upon the proper interpretation of the statute and the proper interpretations of the terms contained within that statute, and further based upon the by the legislative history of the stated purpose of the statute, 31.18(b)(1) was not intended to reach this type of conduct, and the evidence, even when viewed in the light most favorable to the verdict, does not establish a violation of this particular statute. Accordingly, Appellant's conviction should be overturned and a judgment of acquittal entered in this case.

Insufficient evidence the Appellant ever possessed the goods in question.

Alternatively, Appellant argues that the evidence is insufficient to support his conviction for cargo theft because there is no evidence that he conducted an activity,

namely hooking up to a trailer, in which he was in possession of stolen cargo. Notwithstanding the previous argument regarding the term cargo and whether the alleged cargo was stolen within the meaning of the statute, Appellant claims that a) the evidence is insufficient to show that he committed the activity alleged in the indictment, hooking up to the trailer, and further that there is no evidence to allow a rational trier of fact to find that b) by virtue of any activity he did commit, he was ever in possession of any trailer or the goods therein.

Did Appellant commit the act alleged in the indictment, namely hooking up to the trailer? Appellant argues that the evidence shows only that he began the process of hooking up to the trailer by backing his truck underneath the trailer, but that he did not complete the process of "hooking up to the trailer" by manually hooking up the brake lines and raising the lifts. This would constitute, at most, an attempt at "hooking up" as recognized by Justice Gray in his dissent. The evidence is undisputed that the brake lines were never hooked up and the lifts were never raised. The evidence is also undisputed that without these two steps, the trailer could not be moved even one inch. Quite simply, this act of backing the truck under the trailer did not constitute the completed act alleged in the indictment of "hooking up" and further, the activity committed by Appellant did not put him in possession of the

trailer or its contents.

The majority focuses on the argument that asportation is not required for theft but in doing so they fail to rebut the argument made by Appellant, which is that he did not possess the goods under the definition of possession. "Possession" is defined as "actual care, custody, control, or management." Texas Penal Code § 1.07(a)(39). Most cases involving possession surround the possession of drugs. These cases are instructive by analogy to the issue of possession of stolen cargo as alleged in this case. To prove unlawful possession of a controlled substance, the State must establish beyond a reasonable doubt that "(1) the accused exercised control, management, or care over the substance; and (2) the accused knew the matter possessed was contraband." *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005). According to the state's own witnesses, the trailer never left the yard and was in the care, custody, control, and management of Corsicana Bedding throughout the entire incident. Both Perez and Lemus acknowledged that without the brake lines connected and the lifts raised, the trailer could not be moved an inch. Appellant was never in custody of the goods in that trailer. If you cannot move something, are you in control of the thing? The issue is not asportation, but control. He never exercised any control of them. He never took any action to manage them

or to care for them. He could not have moved them or done anything with them if he tried. A reasonable fact finder could not have concluded that Appellant actually "hooked up" to the trailer and further could not conclude that Appellant was in possession of the goods within the trailer at any point. As recognized by Justice Gray, notwithstanding the argument made above with respect to the definition of "cargo" and "stolen," should this Court agree with Appellant with respect to the "possession" issue, the remedy would be to reverse the decision of the Court of Appeals, reform the judgment to reflect a conviction for attempted theft of cargo, and remand to the trial court for a new punishment hearing since the punishment assessed is not within the range of punishment for an enhanced state jail felony which would be 2-20 years.

PRAYER

WHEREFORE, PREMESIS CONSIDERED, Appellant prays that this Court sustain Appellant's Issue 1, overturn the judgement against him and enter a judgment of acquittal or, in the alternative, reverse the judgment of the Court of Appeals and reform the Judgment of the Trial Court to reflect a conviction for Attempted Theft of Cargo, a State Jail Felony, and remand to the Trial Court for a new punishment hearing, and for such other and further relief to which Appellant may be entitled.

Respectfully submitted,
/s/

Damara H. Watkins
S.B.N. 00787740
110 W. Collin
Corsicana, Texas 75110
Phone: (903)641-2595
damarawatkins@gmail.com
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Appellant certifies that the above and foregoing Brief of Appellant filed in this case on complies with the word-count limitations of Tex. R. App. P. 9.4(i) because it contains 4271 words, as calculated by the word-count feature of the software used to prepare said document.

/s/

Damara H. Watkins

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Appellant's Brief was served upon Will Thompson, Navarro County District Attorney's Office, and Stacey

Soule, State Prosecuting Attorney's Office, by electronic delivery and via email on November 3, 2021.

/s/

Damara H. Watkins

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

damara watkins on behalf of Damara H. Watkins
Bar No. 787740
damarawatkins@gmail.com
Envelope ID: 58821869
Status as of 11/4/2021 8:30 AM CST

Associated Case Party: State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Will Thompson		wthompson@navarrocounty.org	11/3/2021 2:25:58 PM	SENT
Stacey Soule		stacey.soule@SPA.texas.gov	11/3/2021 2:25:58 PM	SENT